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9th Circuit: 'Dynamex' Worker Classification Test Applies Retroactively

In a case brought more than a decade ago by janitorial workers who claim they were misclassified as independent contractors, a three-judge panel of the Ninth Circuit found that the worker classification test the California Supreme Court laid out last year applies retroactively.

By **Ross Todd** | May 02, 2019 at 06:13 PM

The U.S. Court of Appeals for the Ninth Circuit in San Francisco, California. Photo by Jason Doiy/ALM

A federal appellate court has found that the **worker-friendly standard that the California Supreme Court laid out last year** for when workers should be classified as employees rather than independent contractors applies retroactively.

The U.S. Court of Appeals for the Ninth Circuit **on Thursday found** that the three-part test California's high court outlined in its *Dynamex Operations West v. Superior Court* opinion last April applies in a case brought by janitorial workers pursuing claims against Jan-Pro International Franchising Inc. The decision revives a case that U.S. District Judge William Alsup in San Francisco knocked out on summary judgment before the California Supreme Court's decision in *Dynamex*.

"Given the strong presumption of retroactivity, the emphasis in *Dynamex* on its holding as a clarification rather than as a departure from established law, and the lack of any indication that California courts are likely to hold that *Dynamex* applies only prospectively, we see no

basis to do so either," wrote U.S. District Judge Frederic Block of the Eastern District of New York, sitting by designation on the Ninth Circuit.

"Besides ensuring that Plaintiffs can provide for themselves and their families, retroactivity protects the janitorial industry as a whole, putting Jan-Pro on equal footing with other industry participants who treated those providing services for them as employees for purposes of California's wage order laws prior to *Dynamex*," added Block. He was joined in the opinion by Ninth Circuit Judges Ronald Gould and Marsha Berzon.

The decision is a victory for Shannon Liss-Riordan of Lichten & Liss-Riordan, who besides pursuing claims against a wide swath of gig economy companies, has represented California-based janitorial workers in their case against Jan-Pro for more than a decade. In a phone interview Thursday, Liss-Riordan said the decision was "a very strong statement about the importance and the strength of the ABC test" outlined in *Dynamex.* But she added that the finding that the test applied retroactively shouldn't come as a surprise to companies.

Indeed, Liss-Riordan won **a ruling from a state court judge in Orange County** last year shortly after *Dynamex* was handed down finding that the ABC test applies retroactively in a dispute involving exotic dancers and the Anaheim-based company Imperial Showgirls and at least two other lower courts had made similar findings before Thursday's Ninth Circuit ruling.

Jan-Pro's lawyer, Jeffrey Rosin of O'Hagan Meyer in Boston, said that his client planned to petition for a rehearing based on "an issue of fact and law" that it didn't think the court adequately addressed, especially considering the unique procedural history of the case, which has been ongoing since 2008.

"The 9th Circuit's applicability of *Dynamex* in this case presents an unfair situation whereby a franchisee who severed his franchise relationship a decade ago, which was not even with JPI, will have his case analyzed against JPI under a legal standard adopted last year," Rosin said via email.

'No Surprise' on Either Side of the Bar

Both plaintiff- and management-side employment lawyers who are not directly involved in the case agreed with Liss-Riordan that it came as little surprise that the Ninth Circuit would find *Dynamex* applied retroactively.

“It’s a troubling but not surprising outcome,” said Jason Geller, the managing partner of the San Francisco office of national labor and employment firm Fisher & Phillips. “I don’t know that it’s going to be the death knell to the gig economy, but it underscores that this is the landscape for companies when they are hiring contractors, especially in the wage-and-hour context.”

In particular, Geller said that the opinion emphasizes the critical nature of prong B of the *Dynamex* test, which requires hiring entities to show that they are not engaged in the same “usual course of business” as a worker in order to classify them as an independent contractor.

“I think that’s in a lot of ways the hardest part of the test to satisfy,” Geller said. “In my experience, a lot of hiring companies are changing some of their practices and risk assessments in deciding on how to engage somebody.”

Michael Rubin of plaintiff-side employment firm Altshuler Berzon said that though Jan-Pro “isn’t a gig economy case at all, it nonetheless points clearly to how another panel of the Ninth Circuit or any state court might analyze prong B.” Rubin also said that he rejected the idea put forward by some management-side attorneys that the *Dynamex* decision had created more uncertainty for employers.

“If more workers are classified correctly, there will be less unfair competition and courts will undoubtedly have fewer misclassification cases in the future,” Rubin said. “Some companies that are otherwise not in compliance with the law may not like the new clarity, because they can no longer hide from the reality of their unlawful conduct,” he said.

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